

SERVICE DATE – APRIL 26, 2017

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35087 (Sub-No. 8)

CANADIAN NATIONAL RAILWAY COMPANY AND GRAND TRUNK CORPORATION—CONTROL—EJ&E WEST COMPANY

Digest:¹ The Illinois Department of Transportation and the Village of Barrington, Ill., have jointly requested that the Board now reopen this proceeding to require Canadian National Railway Company (CN) to fund a grade-separated crossing at U.S. Route 14 in Barrington as a condition of the Board's 2008 approval of CN's acquisition of EJ&E West Company. Petitioners also ask the Board to extend its oversight period. The Board finds that petitioners have not presented new evidence or substantially changed circumstances that warrant the requested additional mitigation condition or an oversight extension and therefore denies the requests.

Decided: April 25, 2017

On January 10, 2017, the Illinois Department of Transportation and the Village of Barrington, Ill. (Barrington) (collectively, Petitioners), jointly filed a petition seeking additional mitigation that would require Canadian National Railway Company to provide funding for a grade separation in Barrington at U.S. Highway 14 (U.S. 14). Petitioners also seek an extension of the Board's oversight period until January 9, 2019. For the reasons discussed below, Petitioners' request for additional mitigation and an extension of the oversight period will be denied.

BACKGROUND

In 2008, the Board approved the acquisition of control by Canadian National Railway Company and Grand Trunk Corporation (collectively, CN) of EJ&E West Company (EJ&E), a wholly owned, noncarrier subsidiary of Elgin, Joliet and Eastern Railway Company, subject to environmental and other conditions. Canadian Nat'l Ry.—Control—EJ&E W. Co. (2008 Final Decision), FD 35087 (STB served Dec. 24, 2008), aff'd sub nom. Vill. of Barrington v. STB, 636 F.3d 650 (D.C. Cir. 2011). The approval was subject to, among other conditions, a five-year monitoring and oversight period to allow the Board to closely examine various impacts of the transaction. As part of the Board's oversight, CN submitted monthly reports on its operations

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

and quarterly environmental reports so that the Board would be kept apprised of the implementation and effectiveness of the mitigation conditions.

The Board conducted an environmental review in accordance with the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 *et seq.*, as part of the Board's review of CN's application to acquire control of EJ&E. The Board's Office of Environmental Analysis (OEA) prepared an Environmental Impact Statement (EIS) examining the potential environmental effects of the transaction, including an extensive analysis of the transaction's potential impact on highway/rail at-grade crossings along the EJ&E rail line. Using CN's estimates for projected train traffic on the EJ&E line for the year 2015, which accounted for proposed upgrades to the line that would be completed before 2015, OEA examined the potential impacts on all 112 crossings along the EJ&E line, including the crossing at U.S. 14 in Barrington. Based on criteria used in the EIS to evaluate which acquisition-related crossings were "substantially affected," OEA recommended mitigation for eight of the 112 crossings and found a grade separation to be appropriate mitigation for two crossings, at Ogden Avenue in Aurora, Ill., and Lincoln Highway in Lynwood, Ill. Based on OEA's analysis and recommendations, the Board concluded that the intersection at U.S. 14 did not meet the Board's criteria for a "substantially affected" crossing or a grade separation mitigation condition, as any traffic issues would be primarily the result of preexisting conditions. *See 2008 Final Decision*, slip op. at 45 & n.101.

In light of concerns raised by citizens and communities regarding the accuracy and completeness of CN's reports, including allegations that CN was underreporting the number of crossing blockages lasting for 10 minutes or more, in 2009 the Board commissioned a third-party audit of CN's latest reports. Having received the audit report, the Board held an oral hearing on April 28, 2010, to address these crossing blockage issues, and the Board then sought public comments on the audit report. Based on the public comments and the audit report, the Board found that CN had knowingly underreported the number of blocked crossings and issued a \$250,000 fine against the carrier. *Canadian Nat'l Ry.—Control—EJ&E W. Co.* (Decision No. 27), FD 35087 (STB served Dec. 21, 2010) (with Board Member Nottingham dissenting). The Board also directed CN to provide additional information in its reports regarding crossing blockages and extended the oversight period by one year, to January 23, 2015. *Canadian Nat'l Ry.—Control—EJ&E W. Co.* (Decision No. 26), FD 35087 (STB served Dec. 21, 2010).

2011 Barrington Petition to Reopen. In 2011, in this proceeding, Barrington requested that the Board, pursuant to its continuing oversight jurisdiction, reopen the proceeding to require CN to pay for a grade separation at U.S. 14. In support of its request, Barrington submitted an updated traffic impact study (2011 traffic study) prepared by its consultant. That study projected train operations and resulting vehicle delay for 2015, based on train operations through Barrington observed during a 35-day period in 2011. Barrington argued that the study showed that U.S. 14 would experience over 40 hours of total vehicle delay in a 24-hour period, thus exceeding one of three criteria used by the Board for determining "substantially affected" crossings potentially eligible for mitigation under the Board's standards. By decision served on November 8, 2012 (*2012 Decision*), the Board denied the petition, finding that Barrington had

not presented new evidence or changes in facts or circumstances that would have materially altered the Board's conclusions in the 2008 Final Decision regarding appropriate mitigation. The Board explained that simply exceeding the threshold criteria for "substantially affected" crossings did not automatically warrant any mitigation in the 2008 Final Decision. Rather, the Board had considered a range of evidence, studies, and factors in deciding what mitigation conditions to impose. The Board found that Barrington's alleged "new evidence" in the 2011 traffic study would not have changed the outcome of the Board's original decision not to require a grade separation at U.S. 14 because, as the Board had determined in the 2008 Final Decision, Barrington's vehicle delays were primarily attributable to preexisting traffic conditions and capacity constraints. Canadian Nat'l Ry.—Control—EJ&E W. Co., FD 35087 (Sub-No. 8) (STB served Nov. 8, 2012), aff'd sub nom. Vill. of Barrington v. STB, 758 F.3d 326 (D.C. Cir. 2014).

2014 Barrington Petition to Extend Oversight. On August 28, 2014, Barrington and the TRAC Coalition filed a petition in this proceeding to extend the oversight period for two years. The Board granted this request, extending oversight until January 23, 2017. Canadian Nat'l Ry.—Control—EJ&E W. Co., FD 35087 (STB served Dec. 17, 2014) (with Board Member Begeman dissenting).

2014 Barrington Petition to Reopen. On November 26, 2014, Barrington filed another petition to reopen, asserting that an "unforeseen" surge in energy-related rail traffic on CN's rail network amounted to new evidence and substantially changed circumstances warranting reopening to require CN to pay \$47 million to complete the cost of a grade separation at U.S. 14. By decision served May 15, 2015 (May 2015 Decision), the Board denied Barrington's petition. The Board noted that rail traffic volumes and train lengths on the EJ&E line were close to or lower than the projected levels relied upon by the Board in its 2008 Final Decision. May 2015 Decision, slip op. at 4. The Board further explained that, even if that had not been the case, exceeding a certain level of rail traffic did not automatically warrant mitigation under the Board's criteria. Id. at 5. Lastly, the Board concluded that Barrington had not presented any new evidence that would alter the Board's determination that projected vehicular delays at and around U.S. 14 were primarily attributable to preexisting conditions at and around U.S. 14, not the transaction. Id. at 6. By decision served November 4, 2015, the Board denied Barrington's petition for reconsideration of the May 2015 Decision.

2017 Joint Petition. Barrington and the Illinois Department of Transportation now request that the Board reopen the proceeding to require CN to pay \$37.5 million toward the cost of a grade separation at U.S. 14 and extend the oversight period to January 9, 2019.² Petitioners base their request on alleged new evidence and substantially changed circumstances regarding the "current and imminent impacts" of CN's operations on the U.S. 14 crossing that "exceed the

² Letters in support of the petition were filed by United States Senators Richard J. Durbin and Tammy Duckworth, United States Representative Peter J. Roskam, and the City of Aurora, Ill. United States Representative Steve Cohen filed a letter opposing Petitioners' request to extend the oversight period.

adverse impacts that the Board anticipated” in formulating and adopting mitigation in its 2008 Final Decision.³ (Pet. 3.)

On January 30, 2017, CN filed its opposition to the petition, asserting that Petitioners have not provided new evidence, nor have they demonstrated substantially changed circumstances, that would justify reopening and imposing additional mitigation and oversight. (CN Reply 18.) CN asserts that no substantial, unexpected transaction-related safety or traffic congestion problems have arisen and that principles of administrative finality require the Board to deny the petition. (*Id.* at 18-19.)

As discussed below, the Board finds that Petitioners have not presented new evidence or substantially changed circumstances that would materially affect the outcome of the Board’s 2008 Final Decision and warrant reopening to impose an additional condition requiring CN to pay for a grade separation at U.S. 14 or to reinstitute an oversight period. Therefore, the petition will be denied.

PRELIMINARY MATTER

By motion filed February 23, 2017, Petitioners request leave to file a response to CN’s reply. In a reply filed on March 15, 2017, CN requests leave to reply to Petitioners’ February 23 reply, should it be accepted by the Board. Under 49 C.F.R. § 1104.13(c), a reply to a reply is not permitted. However, in the interest of a more complete record, the Board will grant Petitioners’ and CN’s requests and accept their respective replies into the record.

DISCUSSION AND CONCLUSIONS

Standard for Reopening. Under 49 U.S.C. § 1322(c) and 49 C.F.R. § 1115.4, the Board may reopen a proceeding because of “material error, new evidence, or substantially changed circumstances.” The alleged grounds must be sufficient to lead the Board to materially alter its prior decision. If a party has presented no new evidence, changed circumstances, or material error that “would mandate a different result,” then the Board will not reopen. *See Montezuma Grain v. STB*, 339 F.3d 535, 541-42 (7th Cir. 2003); *DesertXpress Enters.—Pet. for Declaratory Order*, FD 34914, slip op. at 6-8 (STB served May 7, 2010). Here, Petitioners do not allege material error. And, as discussed below, the Board finds that Petitioners do not present new evidence or substantially changed circumstances that warrant reopening this proceeding to require CN to provide funding for a grade separation at U.S. 14 or to reinstitute the Board’s oversight period.

Imposition of Grade-Crossing Mitigation in the 2008 Final Decision. As the Board has explained in previous decisions, under the agency’s established methodology for assessing whether mitigation should be imposed at an at-grade crossing, meeting or exceeding a certain

³ On January 17, 2017, Petitioners submitted a modification to their petition, replacing the chart that appeared on page 4 of the petition with an amended chart.

level of traffic does not automatically warrant mitigation.⁴ During the EIS process, OEA conducted an extensive analysis of the crossings along the EJ&E line, including U.S. 14. However, as noted, exceeding one of the threshold criteria was not by itself a basis for the Board to impose mitigation. Instead, the Board considered several factors in determining whether a given crossing received mitigation. Here, OEA determined that 13 of the 112 crossings along the EJ&E rail line would be “substantially affected” by the transaction, having met or exceeded at least one of three threshold criteria, based on rail and car traffic projections for 2015.⁵ Several other factors, including preexisting congestion, then went into determining whether any mitigation was appropriate for a “substantially affected” crossing.⁶ Ultimately, the Board determined that only eight of the 13 substantially affected crossings should receive mitigation, of which two received grade separation mitigation. Although OEA extensively considered U.S. 14 during the EIS process, it concluded that U.S. 14 did not meet any of the thresholds to be considered “substantially affected” and that a grade separation at U.S. 14 would provide minimal benefit to the traffic flow in the Barrington area, primarily due to preexisting roadway capacity constraints near U.S. 14. Final EIS 4-16; 2008 Final Decision, slip op. at 45 n.101; 2012 Decision, slip op. at 12-13 & n.60; May 2015 Decision, slip op. at 6.

Here, Petitioners seek additional mitigation in the form of a contribution from CN of \$37.5 million toward the cost of a grade separation at U.S. 14 and extending the oversight period. However, as discussed below, they have not presented any new evidence or changed circumstances that would materially alter the findings of OEA’s environmental analysis or refute the Board’s conclusion that U.S. 14 did not meet the Board’s criteria for a grade separation mitigation condition. Petitioners have not provided new evidence or changed circumstances demonstrating that U.S. 14 is now a “substantially affected” crossing under the Board’s criteria, or a crossing that would be entitled to the relief Petitioners seek. Rather, Petitioners provide general observations about CN’s current operations and speculation about possible future operations in requesting that the Board “address the current and imminent impacts” of CN’s operations at U.S. 14. (Pet. 3.)

Petitioners also request that the Board’s oversight period, which expired shortly after the petition was filed, continue for approximately two additional years to January 9, 2019. The Board first imposed the oversight condition as part of its 2008 approval of the transaction. Although the acquisition was considered a “minor transaction” under 49 C.F.R. § 1180.2, the

⁴ May 2015 Decision, slip op at 5; 2012 Decision, slip op. at 10; see also EIS 4-8, 4-12, Dec. 5, 2008, Docket No. FD 35087 (Final EIS).

⁵ The three threshold criteria are: (1) crossing level of service (LOS) (where a crossing was at or over capacity and would be reduced to a Crossing LOS of E or F as a result of the transaction); (2) effects on queue length (where a transaction-related queue length would block another roadway that would not otherwise be blocked); and (3) total amount of delay for all vehicles stopped at a crossing (where a crossing would experience more than 40 hours of total transaction-related vehicle delay in a 24-hour period). (EIS 4.3-8 to 4.3-10, July 25, 2008, Docket No. FD 35087 (Draft EIS).)

⁶ Final EIS 4-5, 4-8 to 4-11; 2012 Decision, slip op. at 13 n.60.

Board found that, due to the transaction's potential operational and environmental impacts, establishing a five-year formal oversight period, with detailed quarterly and monthly reporting requirements, would allow the Board to closely monitor the applicants' operations during the oversight period. The Board extended its oversight in 2010 and in 2014, for a total oversight period of eight years, an amount of time well beyond the oversight period the Board has ever imposed in such a transaction (including ones much greater in scope than the one here). The Board has closely followed CN's operations on the line throughout this period. While the Board understands Petitioners' support for continued Board involvement, Petitioners' evidence does not show a need to reinstitute oversight.

Current and Future Traffic Volumes. At the outset, the Board notes that the traffic volumes on the EJ&E line have been and continue to be lower than the projected levels relied upon by the Board in its 2008 Final Decision. In 2008, the Draft EIS projected that, in 2015, an average of 20.3 trains per day would operate over the segment that includes the U.S. 14 crossing.⁷ According to CN's operational reports, the average number of daily trains going through U.S. 14 in 2015 was 19.6.⁸ In 2016, the daily average train count fell to 18.1.⁹ Based on these figures, the Petitioners have not shown any changed circumstances or new evidence regarding current traffic levels.

Nor do Petitioners provide persuasive evidence to support their claim that a significant increase in rail traffic through Barrington is imminent. Petitioners argue that current and anticipated traffic from the Port of Prince Rupert (PPR) would impact the line, noting an increase in container traffic that CN handles to and from PPR since 2008. (Pet. 21-22.) But Petitioners have not shown that rail traffic volumes in Barrington have been or would be materially impacted. CN also notes that only a portion of PPR traffic moves through Barrington. (CN Reply, Ex. B, V.S. Keith Reardon 1.) Should expansion of a terminal at PPR take place, which CN says is uncertain, the potential impact on future traffic volumes appears minimal, as CN estimates that approximately 0.5 total additional trains per day would move through Barrington. (Id. at 2.)

Petitioners also assert that CN's plans for a second rail line (double tracking) through Barrington will increase rail traffic through Barrington. (Pet. 23.) Petitioners cite a Request for Proposal (RFP) issued by CN in 2016 for double tracking on CP's Leithton Subdivision, between Leithton and Joliet. However, CN explains that the RFP was merely an estimate of engineering and construction costs issued as part of CN's regular assessment of capacity and fluidity on its network. (CN Reply, Ex. A, V.S. John Orr 8-9.) CN states that it has no need and no current plans to double-track the line in or near Barrington. (CN Reply, Ex. A, V.S. John Orr 8-9; CN

⁷ Draft EIS Table 4.3-4.

⁸ See CN Monthly Operational Reports (Feb. 2015—Jan. 2016), *available at* <http://www.stbfinancedocket35087.com/html/monthlyreports.html>.

⁹ See CN Monthly Operational Reports (Feb. 2016—Jan. 2017), *available at* <http://www.stbfinancedocket35087.com/html/monthlyreports.html>.

Reply 8 & Ex. 1, V.S. John Orr 2, March 15, 2017.) Thus, the record does not support Petitioners' claim.

Even if CN's traffic volumes through Barrington increase in the future, it is unlikely that any such increases would be attributable to this transaction, which was approved over eight years ago. Instead, a variety of other factors unrelated to the transaction, such as changes in the industry, economic growth, and energy prices, are now just as likely to play a role in future fluctuations in rail traffic. In fact, OEA determined in the EIS that 2015 represented the limit of what was reasonably foreseeable with regards to projected rail traffic on the EJ&E line as a result of the transaction, recognizing that forecasting time horizons that went beyond 2015 would be speculative. Draft EIS 2-27. Therefore, multiyear projections are inherently imprecise and some variances from project data over time are to be expected. Thus, Petitioners' comparisons of current and future traffic volumes to the 2015 traffic volume projections are of limited value.

Reportable Blocked Crossings at U.S. 14. Petitioners claim that additional oversight is needed due to issues pertaining to blockages at U.S. 14, despite the fact that the number of daily trains moving through Barrington is lower than traffic levels projected for 2015 and U.S. 14 has experienced, on average, less than one reportable blocked crossing (i.e., a crossing that is blocked for 10 minutes or more) a month in 2016.¹⁰ Petitioners acknowledge that blocked crossings in and around Barrington are "substantially (and suspiciously) less than those at the surrounding crossings," but suggest that such disparity will not continue once the Board's oversight period ends. (Pet. 16-18.) The Board finds no support for Petitioners' contention. Rather, as CN explains, operational reasons make it unlikely that crossings in Barrington would experience lengthy blocked crossings both now and in the future. (CN Reply, Ex. A, V.S. John Orr 5.) Specifically, the UP line that crosses the EJ&E line in Barrington (the Barrington Interlocking) has frequent Metra commuter trains that have priority over CN's traffic. (*Id.*) Thus, the windows available to CN to move its traffic through Barrington generally are short. (*Id.*) CN states that, given the close proximity of the Barrington Interlocking to U.S. 14 and other EJ&E crossings in Barrington, CN paces its trains to get past the Barrington crossings and, if necessary, hold them outside the Barrington area to avoid stopping in Barrington. (*Id.* at 5-6.)

Petitioners also argue that, because CN's trains are longer and slower than the average length and speed that it had originally projected, CN's trains will lead to longer delays at grade-level crossings, including delays at U.S. 14.¹¹ (Pet. 13-16.) As CN notes, however, the impact of fewer but longer trains on vehicular delay may be less than if CN were running a greater number of shorter trains. CN states that fewer but longer trains may reduce the overall crossing activation time given that the amount of time a crossing is activated before and after the arrival

¹⁰ See CN Monthly Operational Reports (Feb. 2016—Jan. 2017), *available at* <http://www.stbfinancedocket35087.com/html/monthlyreports.html>.

¹¹ In 2008, the Draft EIS projected that trains running through Barrington would be on average 6,829 feet in length and would travel at an average speed of 40 miles per hour. Petitioners base their argument on observational camera-generated data for three months in 2016, one month in 2015, and two months in 2011, which show average train lengths greater than 6,829 feet and average speeds slower than 40 miles per hour.

of each train is fixed, regardless of train length. (CN Reply, Ex. A, V.S. John Orr 7-8.) CN also explains that it reduced the allowable speed through the Barrington Interlocking from the originally projected 40 miles/hour to 30 miles/hour “to provide an extra margin of safety.” (*Id.* at 5 n.3.)

In any event, while Petitioners question the accuracy of CN’s original speed and train length projections, (Pet. 14-16; Petitioners Reply 9-10, Feb. 23, 2017), they do not quantify the operational data they have collected to show that U.S. 14 now meets the Board’s criteria for a grade-separated crossing. They merely assert that, based on these observed speeds and lengths, “daily traffic delays at [U.S. 14] calculated by OEA in 2008 must be ‘materially different’” than what was projected during the NEPA review. (Pet. 16.) But as the Board has repeatedly noted throughout this proceeding, some variance between what was projected and what has occurred is expected. Petitioners therefore must do more than show that a variance exists to demonstrate new evidence or changed circumstance, which they have not done with regard to this issue.

Transportation of Hazardous Materials. Petitioners assert that the volume of hazardous materials transported through Barrington has exceeded the level projected in 2008, and that this increased volume may impede emergency response efforts. (Pet. 18-20.) This is not new evidence, as Barrington relied on increased transportation of hazardous materials in its 2014 petition for reopening, which the Board found did not warrant reopening. See May 2015 Decision, slip op. at 7. Moreover, the Board finds no evidence here that would have materially altered its 2008 findings and require mitigation for impacts to emergency response beyond the mitigation originally imposed. Petitioners speculate that CN has nearly doubled its projected amount of hazardous material traffic and “may actually be hauling over 400 hazmat cars per day,” based on statements made by CN at an August 2014 meeting with Barrington. (*Id.*) CN counters that, on average, 254 hazmat cars per day (127 loaded cars and 127 empty cars) moved through Barrington in 2016. (CN Reply, Ex. A, V.S. John Orr 7 n.4.) CN further explains that the increase over the projected level of hazmat traffic was due to crude oil traffic, which has declined since its peak in 2014. (*Id.*)

In any event, as the Board explained in its May 2015 Decision, the Final EIS recognized that increases in freight rail traffic along the EJ&E rail line may increase the risk of hazardous material spills; however, the Board agreed with OEA’s conclusion that the acquisition transaction would not create any new threats, given that freight already transported on the EJ&E line prior to the transaction included hazardous materials. May 2015 Decision, slip op. at 7. The Board found that “that conclusion remains valid even though the volume of energy-related traffic that moves through Barrington has increased.” *Id.* As the Board also noted, rail carriers have a statutory common carrier obligation to transport hazardous materials where the appropriate agencies (such as the Federal Railroad Administration, the Transportation Security Administration, and the Pipeline and Hazardous Materials Safety Administration) have promulgated comprehensive safety regulation. *Id.* Those agencies have primary jurisdiction over rail safety issues and have established regulations applicable to the transportation of hazardous materials by rail, which, along with the mitigation measures imposed in the 2008 Final Decision, should appropriately minimize the safety risks associated with hazardous materials transportation on the EJ&E line.

Conclusion. As discussed, the Board concluded in its 2008 Final Decision that U.S. 14 did not meet the Board’s criteria for a grade separation mitigation condition. Petitioners have provided no new evidence or substantially changed circumstances that would alter that conclusion and warrant additional mitigation or a reinstitution of the oversight period. Petitioners urge the Board “to look past the pre-transaction multi-year projections” on which the Board based its 2008 Final Decision and mitigation conditions, stating that, during the oversight period, the Board may “consider and . . . react to any adverse impacts” that the transaction might have. (Petitioners Reply 2, 6, Feb. 23, 2017, citing the Board’s Condition No. 72.) While the Board retained the right to impose additional mitigation during the oversight period in that condition, it made clear that it would do so only “if there is a material change in the facts or circumstances upon which the Board relied in imposing specific environmental conditions.”¹² 2008 Final Decision, App. A, Condition No. 72. As discussed above, Petitioners raise concerns about the impacts of CN’s operations but do not quantify the impacts or operational data in a manner that would warrant a different result under the criteria relied upon by the Board in 2008. Accordingly, the Board will deny Petitioners’ request for reopening to impose additional mitigation and a reinstitution of the oversight period.

It is ordered:

1. Petitioners’ petition to reopen is denied.
2. Petitioners’ request for leave to file a reply to a reply is granted.
3. CN’s request for leave to file a reply to Petitioners’ February 23, 2017 reply is granted.
4. This decision is effective on its date of service.

By the Board, Board Members Begeman, Elliott, and Miller.

¹² The Board has specifically found that Condition No. 72 does not independently establish a standard for reopening to modify conditions apart from the material error, new evidence, or changed circumstances statutory standards at 49 U.S.C. § 1322. See 2012 Decision, slip op. at 9.